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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

LOY REE B. MARLOWE BALLAM,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Question Presented for Review

Does the construction by the United States of a navigable canal through privately owned fastlands pursuant to the grant of an easement therefor over a discretely defined strip of such fastlands result in the imposition of a navigable servitude over the fastlands bordering the easement so as to permit the taking of such bordering lands by erosion without the payment of just compensation as required by the Fifth Amendment to the United States Constitution?

Parties

Petitioner Loy Ree B. Marlowe Ballam was the plaintiff in the District Court for the District of South Carolina and the Appellee in both the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Federal Circuit. The United States of America was the defendant in the District Court for the District of South Carolina and the Appellant in both the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Federal Circuit. The State of South Carolina was also named as a Defendant in the original action brought by Petitioner. The District Court granted Defendant State of South Carolina's Motion to Dismiss and dismissed the State as a party Defendant to the central action. No party appealed this aspect of the District Court's decision. There have been, and are, no other parties to the case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Reports of Opinions

The Order of the District Court is reported at 552 F.Supp. 390 (D.S.C. 1982). The panel opinion of the United States Court of Appeals for the Fourth Circuit is reported at 747 F.2d 915 (4th Cir. 1984). The Order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's suggestion for rehearing and rehearing in bank has not been reported. The Order of the United States Supreme Court vacating the judgment of the United States Court of Appeals for the Fourth Circuit is reported at 106 S.Ct. 844 (1986). The opinion of the United States Court of Appeals for the Federal Circuit has not yet been reported. The complete texts of these opinions are set forth in the Appendix to this Petition.

Jurisdiction

The opinion of the Court of Appeals for the Federal Circuit reversing the District Court's judgment by a two to one majority decision was decided and entered on November 28, 1986. The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. Section 1254(1).

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article 1, Section 8 Paragraph 3 of the United States Constitution provides that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

28 U.S.C.A. Section 1346(a)(2) provides:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of...any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort

which are subject to Section 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

Statement of the Case

On January 25, 1982, Plaintiff Loy Ree B. Marlowe Ballam ("Ballam") filed a complaint in the United States Court for the District of South Carolina against the United States and the State of South Carolina. In her complaint, Ballam alleged that the defendants had unconstitutionally taken her property without compensation in violation of Fifth and Fourteenth Amendments of the United States Constitution and Article 1 Section 13 of the South Carolina Constitution. Ballam alleged that the district court possessed jurisdiction pursuant to the Tucker Act, 28 U.S.C.A. Section 1346. The district court granted Defendant State of South Carolina's motion to dismiss and dismissed the State as a party to the action. Neither the United States nor Ballam appealed this dismissal.

Ballam owns real estate adjacent to the governmentally created Atlantic Intracoastal Waterway (the "Waterway") with a frontage of approximately one hundred thirty-six (136) feet. By deed dated September 10, 1931 Ballam's predecessor-in-title granted to the State of South Carolina a perpetual easement to enter upon, excavate, cut away, and remove any and all of a strip of land three hundred twenty (320) feet in width and approximately seventeen hundred (1700) feet in length, for the purpose of constructing and maintaining the Waterway. South Carolina subsequently deeded this easement to the United States. Ballam's property is a part of the lands that border on this 1700 foot strip.

As originally authorized, the Waterway project provided for a channel eight (8) feet deep and seventy-five (75) feet wide at the bottom. Sometime around the year 1941, the United States Army Corps of Engineers enlarged the channel to a depth of twelve (12) feet and a width of ninety (90) feet at the bottom. As enlarged, the top of the Waterway in the area of Ballam's property was approximately two hundred thirty-five (235) feet wide. This width left approximately eighty-five (85) of the three hundred twenty (320)

foot easement unused, fifty-three (53) feet of which were on Ballam's side of the Waterway. At that time, the Waterway along Ballam's property was still within the easement granted to the State and conveyed to the United States. Since the Waterway's construction, the Corps of Engineers, an agency of defendant United States, has maintained the Waterway.

Since 1941, there has been an erosion of all of the remaining fifty-three (53) feet of the easement. The erosion has continued and eaten into Ballam's adjoining property. Within the seven (7) years preceding the filing of this action, Ballam's property has eroded to a depth of approximately four (4) feet on the west end and to a depth of twenty-nine (29) feet on the east end. The erosion has not become stabilized, but continues. The district court found that the primary cause of the erosion to Ballam's property consisted of wave wash from vessels using the Waterway.

In rendering judgment for Ballam, the district court held that the erosion of Ballam's property beyond the boundary of the United States' easement constituted a taking for which Ballam is entitled to just compensation under the Fifth Amendment to the United States Constitution. The district court further held that the parties could not have assumed that the Waterway would use more land than the three hundred twenty (320) feet granted by the easement. The district court awarded Ballam damages in the amount of six hundred forty-four ($644.00) Dollars for the value of the land taken within the previous six years and eight thousand one hundred sixty ($8,160.00) Dollars as the cost for the installation of a revetment to prevent future damage for a total award of Eight Thousand Eight Hundred Four ($8,804.00) Dollars. The United States appealed to the Court of Appeals for the Fourth Circuit.

On October 23, 1984, a panel of the Court of Appeals for the Fourth Circuit reversed the district court's judgment by a two to one majority decision. Writing for the majority, Judge Murnaghan held that the encroachment into Ballam's adjoining property beyond the confines of the initial grant did not constitute a compensable taking under the Fifth Amendment. The

majority held that the federal government could expand the original taking beyond the scope originally bought and paid for by asserting that the adjacent fastland had become subject to the federal government's navigational servitude.

Dissenting, Judge Ervin stated that the majority's assumption, that the original easement created "exactly the same situation or condition" that would have existed if the Waterway at the site in question had been natural and not man-made, is unacceptable and unsupportable.

After the court of appeals denied Ballam's petition for rehearing, Ballam petitioned this Court for a writ of certiorari. On January 21, 1985, this Court granted Ballam's petition, vacated the judgment of the court of appeals and remanded the case with instructions to transfer the case pursuant to 28 U.S.C. Section 1631 to the Court of Appeals for the Federal Circuit.

On November 28, 1986, a panel of the Court of Appeals for the Federal Circuit reversed the district court's judgment by a two to one majority decision. Writing for the majority, Judge Nichols held that the issue was whether Ballam's cost of building a revetment should "be shifted to the government." Slip op. at 8. The majority held that she did not.

Dissenting, Judge Bissell stated that the right asserted is not the right to be compensated for a revetment, rather it is Ballam's right to the exclusive use of her property. Judge Bissell stated that the easement granted by Ballam's predecessor-in-title means only that Ballam has given up the right to exclusive use of that portion of her land described in the easement, but not the rest of her land.

Argument

Ballam submits that the Court of Appeals for the Federal Circuit has decided an important question of federal constitutional law which has not been, but should be settled by this Court.

Ballam submits that the majority decision of the court of appeals is totally inconsistent with this Court's decision in *United States v. Dickinson,* 331 U.S. 745 (1947). The United States has

advanced two related arguments in support of its position that the erosion damage to Ballam's property constitutes a non-compensable taking. First, the United States has asserted that the damage to Mrs. Ballam's property constitutes non-compensable consequential damage. Second, the United States asserts that its dominant navigational servitude renders the taking non-compensable. Ballam submits that both positions are unsupportable. The erosion damage caused in part by wave wash from vessels using the government's artificial waterway and in part by natural action constitutes a taking under the Fifth Amendment of the United States Constitution.

The Court of Appeals for the Federal Circuit appears to adopt a variant of the first position. The panel decision ignores the actual taking of Mrs. Ballam's property and focuses on the cost of building a revetment to prevent future damage. See Appendix at 24a. Were this position to stand, the United States could ignore actual damages caused by the government in constructing public works and focus on the cost of preventing future damage in cases involving a continuous taking. This position allows the United States to have "bought the farm" without paying the compensation required by the Fifth Amendment. The actual damage done to Mrs. Ballam's property has been and continues to be caused by the creation of an artificial stream built by direct governmental action. Until the grant of easement by Ballam's predecessor-in-title, there was no stream and there was no possibility of the erosion damage resulting from wave wash; hence, the damage is direct, not consequential.

The Fifth Amendment imposes an affirmative duty on the federal government to compensate private persons for "private property...taken for public use..." U.S. Const. amend. V. This Court has held that all underlying damages which are the direct result of government action are compensable. *United States v. Causby*, 328 U.S. 256, 265-66 (1946) (damages are not consequential where they are "the product of a direct invasion of respondent's domain"). In determining whether a government action constitutes a compensable taking, this Court has held that the

federal government need not compensate "indirect and consequential" damages. *United States v. General Motors Corp.*, 323 U.S. 373, 379-80 (1945); *Sanguinetti v. United States*, 264 U.S. 146, 149-50 (1924). Nonetheless, it is beyond dispute that an initial lawful taking cannot be expanded without additional compensation. See *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961).

In *United States v. Dickinson*, 331 U.S. 745 (1947), this Court held that erosion damage caused by direct governmental action is compensable and not consequential. In that case, plaintiffs brought an action under the Tucker Act to recover the value of property which they claimed had been taken by the federal government. In order to improve a river's navigability, Congress had authorized the construction of a dam which had raised the river level. The raising of the river level had permanently flooded land belonging to respondents and further eroded the land which formed the new bank of the pool. Over the government's claim that the erosion was consequential, this Court affirmed that damage award. This Court held that property "is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in the course of time." *Id.* at 748. "[P]ayment need only be made for what is taken, but for all that the Government takes it must pay." *Id.* at 750. "If the resulting erosion which, as a practical matter constituted part of the taking was in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage...." *Id.* at 751. The trial court's opinion cite *Dickinson* as controlling. Neither panel decision cites it at all.

The Court of Appeals for the Federal Circuit correctly notes that in analyzing whether an economic injury constitutes a compensable taking, "[t]he process of decision must begin by determining whether a 'property right' is involved. See *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03 (1945). The majority, however, fails to address the land taken through wave wash.

The majority of the Court of Appeals for the Federal Circuit

instead analyzes only whether the cost of building a revetment to prevent future erosion should be borne by Mrs. Ballam or by the United States. This position ignores the basis of this Court's holding in *Dickinson* while conceding that the erosion itself has resulted from direct governmental action. See Appendix at 27a. Judge Bissell, however, notes that the taking itself consisted of the loss by Mrs. Ballam of the right to the exclusive use of her land outside the easement. This taking resulted in damages for property lost over the six years prior to the commencement of this action in the amount of $644. This case differs from most taking cases in that the loss continues; erosion caused by direct governmental action is a continuous process that increases Ballam's loss if preventive measures are not taken. The cost of revetment is simply the measure of Ballam's future damages if prudent steps are taken to mitigate against the loss itself.

The United States has clearly taken more property than it was granted in the easement. By failing to acquire enough property and by failing to take actions to prevent encroachment onto property not subject to its easement, the United States has made itself liable for the full amount of property the United States has used and continues to use for its waterway project. "If the government cannot take the acreage it wants without also washing away more, that more becomes part of the taking." *United States v. Dickinson,* 331 U.S. at 750. Under the appellant's theory, the United States could purposely choose not to acquire any buffer zone and never be required to pay compensation for very obvious erosion that would inevitably occur. By failing to acquire enough property initially, the United States has now made itself liable under the Fifth Amendment for the payment of compensation for the full amount of property that has been taken. See *United States v. Causby,* 328 U.S. 256, 268 (1946).

The effect of the majority opinion of the panel of the Court of Appeals for the Federal Circuit is to extend the taking beyond the area described, so as to encompass an infinite portion of the tract, up to the entire farm. Judge Ervin's dissent and Judge Bissell's

dissent view the easement as a whole and conclude that such an interpretation does not comport with the intention of the parties. Had it been intended that the potential taking were to extend without limit beyond the area granted, the document could easily have said so.

The failure of the Court of Appeals for the Federal Circuit majority to analyze the problem in terms of the land taken also renders untenable the majority's position that the statute of limitations began to run on a date certain. As noted by the district court, Judge Bissell, Judge Ervin, and this Court in *Dickinson* the taking by erosion is a continuous process. The majority bases its conclusion on "the peculiar type of property right asserted in this action and the main basis of the award." The district court held that the statute of limitations did not bar complete recovery because the erosion constitutes a continuous taking. See *United States v. Dickinson,* 331 U.S. 745, 749 (1947). The district court limited recovery to the amount of land taken through erosion within six years of the filing of this action.

In *Dickinson,* this Court held that the erosion "is not a single event; it is continuous." 331 U.S. at 749. The Supreme Court held that the statute of limitations does not begin to run from the moment the damage first begins to occur.

> If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him — for instance, the uncertainty of damage and the risk of res judicata against recovering later for damages yet uncertain. The source of the entire claim... is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

Id. In *Hilton v. Duke Power Company,* 254 F.2d 118 (4th Cir.

1958) the Court of Appeals for the Fourth Circuit held that the statute of limitations does not require a plaintiff to bring a lawsuit immediately upon the occurrence of some injury if damages are continuing. 254 F.2d at 122-23. In *Hilton*, the court of appeals held:

> [I]f the cause is abatable, then there arises a continuing cause of action, and while limitations begin to run at the occurrence of the first actual damage, the landowner may at any time recover for injury to his land which occurred within the statutory period.

Id. The second related argument advanced by the United States and adopted by the majority panel decision of the Court of Appeals for the Fourth Circuit addresses the taking issue differently. That opinion concludes that damages to Ballam's property are noncompensable on the ground that her adjacent property became subject to an exclusive navigational servitude when the United States dug a navigable channel through the fastlands that it had acquired for that purpose. The claim of the United States and the holding of the Court of Appeals for the Fourth Circuit would extend the dominant navigational servitude that burdens property bordering on natural navigable channels to highland properties that had no water frontage until the United States acquired a discretely defined adjoining strip of land and dug therein an artificial navigable waterway. This exclusive servitude, the United States asserts, prohibits riparian owners from recovering compensation for damages done to their land by changes in the flow of an artificial stream created by direct governmental action so long as the government does not raise the level of this artificial stream above the normal (ocean) level created when the aritifical waterway was first built. This assertion too fails to note that in this case, until the grant of easement by Ballam's predecessor-in-title, there was no stream; there was no high water mark; Ballam's lands were not riparian nor were they burdened with any servitude.

This Court has held that the navigational servitude created by Congress's right to regulate interstate commerce does not "cre-

ate [] a blanket exception to the Taking Clause whenever Congress exercises its Commerce Clause Authority to promote navigation." *Kaiser Aetna v. United States,* 444 U.S. 164, 172 (1979). Ballam submits that her damages have been caused by direct federal governmental action not protected by the federal government's dominant navigational servitude.

This Court has previously held that the dominant navigational servitude possessed by the United States to aid interstate commerce relieves the United States from its Fifth Amendment obligation to compensate a landowner for erosion damage within the banks of a natural stream to the ordinary high water mark. *United States v. Virginia Electric and Power Co.,* 365 U.S. 624 (1964); *United States v. Willow River Power Co.,* 324 U.S. 499, 509-10 (1945). This navigational servitude does not extend to damages caused beyond the natural high water mark and the government must compensate for any taking beyond that point. See *United States v. Willow River Power Co.,* 324 U.S. at 509-10. In *Dickinson,* this Court held that the Fifth Amendment requires payment of compensation when the natural water level is raised by direct governmental action, such as the building of a dam. This case raises the issue of whether the construction of another improvement, an artificial channel dug by the government through fastland which creates a new artificial water level where none previously existed, falls within the rule enunciated by this Court in *Dickinson.*

This Court has clearly held that the government may be held liable for damages caused by a "taking" of adjacent fastlands in order to create a new artificial high water mark. *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799 (1950). See also *United States v. Virginia Electric and Power Co.,* 365 U.S. 624 (1961); *United States v. Willow River Power Co.,* 324 U.S. 499, 509-10 (1945).

Two recent decisions of this Court have specifically held that the federal government's navigational servitude does not confer on the federal government the exclusive right to take what it pleases above a natural ordinary high water mark without com-

pensation. In *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), this Court emphasized that the navigational servitude does not create a blanket exception to the Fifth Amendment whenever Congress exercises its commerce clause authority to promote navigation. *Id.* at 172. "The navigational servitude is an expression of the notion that the determination of whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation." *Id.* at 174.

> [W]hen the government acquires fastlands to improve navigation, it is not required under the Eminent Domain Clause to compensate land owners for certain elements of damage attributable to riparian location... but none of these cases ever doubted that when the Government wished to acquire fastlands, it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest.

Id. at 177. In *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979), this Court distinguished between the nature of governmental rights in situation involving natural streams and those involving artificially built waterways. In that case, this Court distinguished "canals built on private property...in such a manner that they ultimately join with other navigable waterways" from "artificial navigable waterway[s created] in part by means of diversion or destruction of a pre-existing natural navigable waterway." *Id.* This Court held that the government does not possess the right to require public use of the former purely artificial waterways while the government might be able to impose such a requirement on an artificial stream which destroyed the navigability of surrounding natural waterways. *Id.* at 208-09.

The United States Army Corps of Engineers itself clearly and explicitly recognized its unique obligations with respect to artificial waterways imposed by this Court's decision in *United States v. Dickinson.* The Corps' internal memorandum of 2 February, 1979 shows that the Corps, an agency of Respondent United States, differentiated between its obligation to protect land bor-

dering artificially created waterways and its more limited responsibility to protect land bordering natural streams. As to the former obligation, the Corps "restated" that division policy required that:

> When erosion occurs and exceeds the limits of the acquired rights-of-way, there is an obligation to protect the adjacent properties. Protection may be achieved by either revetment work or through acquisition of additional property rights. The economics of the situation will determine the course to be followed and may involve a combination. The government may assume the cost of revetment, but in those instances where the sponsor is required to furnish land interest, the sponsor will be informed of the additional land requirements.

Plaintiff's Exhibit 10.

Petitioner submits that his case raises two important related federal questions that this Court should address. First, this case raises the issue of whether damages directly caused by such a government project are "consequential" so as to excuse the federal government from paying the compensation required by the Fifth Amendment. Second, this Court has not determined whether the taking clause of the Fifth Amendment to the United States Constitution imposes an obligation on the United States to compensate adjoining landowners for damage to their property when a governmentally created artificial waterway exceeds the boundary of a specifically defined easement acquired to construct the project.

Conclusion

For the foregoing reasons, the Petitioner urges that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

LOY REE B. MARLOWE BALLAM,
Plaintiff,

v. Civil Action No.
82-127-2

UNITED STATES OF AMERICA,
Defendant.

Judgment

On this the 1st day of December, 1982, the Court having coincident herewith made its findings of fact and conclusions of law herein, and having found and concluded that plaintiff, Loy Ree B. Ballam, is entitled to judgment against the defendant, United States of America, in the sum of Eight Thousand Eight Hundred and Four ($8,804) Dollars, together with interest thereon from the date of this judgment at the current rate per annum allowable in judgments against the United States, it is, therefore,

ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, Loy Ree B. Ballam, do have and recover of and from the defendant, United States of America, the sum of Eight Thousand Eight Hundred and Four ($8,804) Dollars, together with interest thereon from the date of this judgment at the current rate per annum allowable in judgments against the United States.

It is further ORDERED, ADJUDGED and DECREED that all injunctive relief requested by the plaintiff is DENIED.

Entered this the 1st day of December, 1982.

Adrian A. Spears
United States District Judge

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

LOY REE B. MARLOWE BALLAM,

Plaintiff,

v. Civil Action No. 82-127-2

UNITED STATES OF AMERICA,

Defendant.

Findings of Fact and Conclusions of Law

On this the 1st day of December, 1982, the Court, having heard and duly considered the evidence and the arguments of counsel finds and concludes as follows:

Findings Of Facts

(1) Plaintiff, Loy Ree Ballam, a resident of the State of South Carolina, owns real estate adjacent to the Atlantic Intercoastal Waterway (AIWW), with a frontage thereon of approximately one hundred thirty-six (136) feet.

(2) The AIWW was constructed by the defendant, United States of America, during the mid 1930's and early 1940's. The project authorization provided that the local interests would furnish free of cost to the defendant, rights-of-way of sufficient width for a canal prism and for the disposal of spoil.

(3) Pursuant to the conditions of the project authorization, the State of South Carolina obtained the requested rights-of-way and easements, and conveyed them to the defendant.

(4) By deed, dated September 10, 1931, the plaintiff's predecessor in title, granted to the State of South Carolina a perpetual easement

to enter upon, excavate, cut away, and remove any and all of a strip of land three hundred twenty (320) feet in width and approximately seventeen hundred (1700) feet in length, for the purpose of the construction and maintenance of the AIWW. Plaintiff's property is a part of the original 1700 feet granted to the government by the plaintiff's predecessor in title.

(5) The deed from plaintiff's predecessor in title to the State of South Carolina contained the following release:

> The grantor does hereby waive and release the grantee, its successors and assigns and its or their officers, agents, servants, and contractors from any and all claims for damages which may result from the construction and maintenance of the waterway and the deposit of spoil or other matter as hereinabove stated; this waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the grantor and on his, her, its heirs, successors and assigns.

(6) The easement so granted to the State of South Carolina was included in the deed from the State of South Carolina to the defendant.

(7) Since the construction of the AIWW, it has been maintained by defendant, acting through the Corps of Engineers, Department of the Army, an agency of the defendant.

(8) As a part of the maintenance of the AIWW, the defendant has dredged the channel of the waterway every 2 or 3 years. Dredging consists of removing the shoals (sandbanks or sandbars) caused by bank soil flowing into the waterway, and removing any trees, limbs, or similar debris that may have entered the AIWW. This dredging is done in order to aid navigation in the waterway.

(9) The project authorization provided for a channel eight (8) feet deep and seventy-five (75) feet wide at the bottom. Around the year 1941 the channel was enlarged to be twelve (12) feet deep and ninety (90) feet wide. As enlarged, the top of the AIWW, in the area of plaintiff's property, was approximately 235 feet in width, leaving some eighty-five (85) feet of the 320 foot easement unused, fifty-three (53) feet of which was on the Ballam side of the AIWW. Thus,

at that time, the AIWW along plaintiff's property was still within the easement granted to the defendant.

(10) Subsequently, there was erosion of the remaining fifty-three (53) feet of the easement, and ultimately the erosion extended into plaintiff's adjoining property. Within the last seven years, plaintiff's property has been eroded by approximately four (4) feet on the West and twenty-nine (29) feet on the East (a total of 2000 square feet or .046 acre), and the erosion has not become stabilized.

(11) The primary cause of the erosion to the plaintiff's property is wave wash from vessels using the AIWW. The sandy soil on plaintiff's property is such that the erosion is a continuous process and unless remedial measures are taken, her property will continue to erode in the future.

Conclusions of Law

(1) This Court has jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1346(a)(2), since damages sought do not exceed $10,000.

(2) The erosion of plaintiff's property past the boundary of the government's easement, constitutes a taking for which plaintiff is entitled to just compensation. This is not a situation where there is navigable servitude because the rights of the government are derived from the easements granted and not from its sovereign right to aid navigation on a navigable waterway. But even if navigable servitude is involved, the plaintiff could still recover because of the erosion to her fast lands, which are well above high tide. *United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 627, 81 S.Ct. 784, 787, 5 L.Ed.2d 838 (1961); *United States v. Willow Power Co.*, 324 U.S. 499, 509, 65 S.Ct. 761, 767, 89 L.Ed. 1101 (1945). Nor is the erosion a consequential damage for which no compensation can be had. *United States v. Dickinson*, 331 U.S. 745, 750, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947). "The mere fact that all the United States needs and physically appropriates is the land up to the new level of the river, does not determine what in nature it has taken. If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking." *Id.*

(3) The release executed by plaintiff's predecessor in title is not sufficiently broad to be binding upon the plaintiff under the facts of this case. The release was contained in the deed which granted an easement to the government, and applies only to that easement. See *Hilton v. Duke Power Company,* 254 F.2d 118, 123 (4th Cir. 1958). At the time of the granting of the easement it was not contemplated that the full 320 feet would be used for the channel, because the project authorization provided that the ultimate dimensions of the channel would be 12 feet deep and 90 feet wide at the bottom. Thus it is reasonable to assume that the waterway would not use the entire 320 feet granted in the easement. (The government acknowledges the fact that in high bluff areas a larger easement was taken). Additionally, it should be noted that plaintiff's claim is based on a taking of her land — not just for an injury thereto.

(4) The statute of limitations does not bar complete recovery by plaintiff because the erosion constitutes a continuous taking, *United States v. Dickinson,* 331 U.S. 745, 749, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947); however, the plaintiff's recovery is limited to damages for erosion occurring within six years of the filing of this suit. *Hilton v. Duke Power Co., supra,* at 122.

(5) Plaintiff, Loy Ree Ballam, is entitled to damages in the total amount of $8,804.00, caused by the taking of her land, and the cost of protecting the land from future erosion. Testimony as to the value of plaintiff's property ranged from $7,000 per acre to $50,000 per acre, neither of which valuation was, in the opinion of the Court, realistic. Rather, the Court believes that a valuation of $14,000 per acre is more reasonable under the evidence, and, therefore finds the total value of plaintiff's property to be $65,800. (4.7 acres x $14,000).

Since, under the evidence, plaintiff lost, through erosion, .046 of an acre, the value of the property taken was $644. ($14,000 x .046).

With respect to the cost of protecting the property from future erosion, the testimony ranged from $50 to $200 per running foot for 136 feet. (One witness said the cost could run as high as $300). In addition, there was testimony that the land would have to be sloped prior to the installation of a revetment. Again, neither of the

extremes in the testimony can be considered reasonable. (It is interesting to note, however, that the $200 figure was offered as a cost to the government, by a representative of the Army Corps of Engineers). A more realistic amount under the evidence would be $60 per running foot, or a total, for 136 feet, of $8,160. In this connection, the Court finds that it would have been sound economy in view of the character and nature of the property to have made that expenditure. *United States v. Dickinson,* 152 F.2d 865, 870 (4th Cir. 1946), aff'd 331 U.S. 745, 751, 67 S.Ct. 1382, 1386, 91 L.Ed. 1789 (1947).

(6) Plaintiff is entitled to judgment in the amount of $8,804.00.

(7) Plaintiff is not entitled to any injunctive relief under the Tucker Act, 28 U.S.C. § 1346(a)(2). See *Lee v. Thornton,* 420 U.S. 139, 140, 95 S.Ct. 853, 854, 43 L.Ed.2d 85 (1975).

Entered this the 1st day of December, 1982.

Adrian A. Spears
United States District Judge

Opinion of the Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1120

Loy Ree B. Marlowe Ballam,

Appellee,

v.

United States of America,

Appellant,

and

State of South Carolina,

Defendant.

Appeal from the United States District Court for the District of South Carolina, at Florence. Adrian S. Spears, District Judge. (C/A 82-0127)

Argued: March 6, 1984 Decided: October 23, 1984

Before PHILLIPS, MURNAGHAN, and ERVIN, *Circuit Judges.*

Maria A. Iizuka, Dept. of Justice (F. Henry Habicht, II, Assistant Attorney General; Henry Dargan McMaster, United States Attorney, Glen E. Craig, Assistant United States Attorney; Robert L. Klarquist, Dept. of Justice on brief) for Appellant; Augustine T. Smythe (Morris A. Ellison, Buist, Moore, Smythe & McGee; H.F. Bell on Brief) for Appellee.

Opinion of the Court of Appeals for the Fourth Circuit

MURNAGHAN, Circuit Judge:

The appellee, Loy Ree B. Marlowe Ballam, brought suit in the United States District Court for the District of South Carolina claiming erosion damage to her real property caused by the Atlantic Intracoastal Waterway (AIWW). Because the claim was for less than $10,000, the district court had jurisdiction. *See* 28 U.S.C. § 1346(a)(2). The district court awarded Ballam $8,804 in damages.

The United States raises two grounds for reversal. One, it argues that the suit is barred by a release given by Ballam's predecessor-in-title, her father. Two, it contends that the erosion is not compensable because Ballam's land was, and is, burdened by the government's dominant navigational servitude, precluding a finding that there was a taking by the government.

I.

In 1931, the United States authorized the improvement and extension of the Atlantic Intracoastal Waterway from Cape Fear River, North Carolina, to St. Johns River, Florida. *See* Act of July 3, 1930, ch. 847, 46 Stat. 918, 924. The issues here derive from events occurring in a segment of the AIWW in Horry County, South Carolina. The act provided, *inter alia,* that local interests, in the present case the State of South Carolina, would furnish, free of cost to the United States, rights of way of sufficient width for a canal prism and the disposal of soil therefrom. The predecessor-in-title to Ballam (with his wife renouncing dower), by instrument dated September 10, 1931, conveyed to South Caroina for one dollar a perpetual easement, a covenant running with the land, over a 320 foot wide strip running 1700 feet for the construction and maintenance of the waterway. The deed of Ballam's predecessor recognized explicitly that the purpose for which it was obtained was to facilitate construction of a section of the AIWW. It further provided that the channel created for the waterway would be maintained as "a part of the navigable waters of the United States."

South Carolina, in obtaining the grant from Ballam's

predecessor, secured inclusion in its terms of a release from all claims for damages from construction and maintenance of the AIWW. The release also covered claims for damages relating to deposit of soil.

South Carolina, in turn, conveyed the easement to the United States. The United States Army Corps of Engineers proceeded to construct the extension of the AIWW. The initial dimensions of the waterway were 8 feet deep with a channel 75 feet wide.[1]

In 1941 the dimensions of the AIWW in the Horry County area were increased to a depth of 12 feet and a width of 90 feet. Thereupon, 85 feet of the easement granted by Ballam's predecessor remained above water, 53 feet of which were on the side of the waterway where Ballam's retained land is located.[2]

Thereafter, erosion, found by the district judge to have been created by the wave wash of passing vessels traversing the AIWW, ate away the 53 feet of the easement on the side occupied by Ballam and intruded on her property not subject to the easement to a distance of 4 feet on the west and 29 feet on the east, namely, 2,000 square feet of .046 of an acre.

[1]/The deed of Ballam's predecessor stated that the waterway would be constructed in accordance with the project report set forth in H.R. Doc. No. 41, 71st Cong., 1st Sess. (1929) *(Report)* and adopted in the Act of July 3, 1930, ch. 847, 46 Stat. 918, 924. The report recommended that the intracoastal waterway from Cape Fear River, North Carolina, to Charleston, South Carolina, should have a depth of 12 feet at mean low water and a bottom width of 90 feet, with the understanding that the canal prism should initially be excavated for a depth of 10 feet at mean low tide and a bottom width of 75 feet. *Report* at 60.

[2]/Plaintiff only owns part of the lands which touch upon the easement granted by her predecessor-in-title.

II.

The deed from Ballam's predecessor which granted an easement for the AIWW contained the following release:

> The grantor does hereby waive and release the grantee, its successors and assigns and its or their officers, agents servants, and contractors from any and all claims for damages which may result from the *construction and maintenance of the waterway and the deposit of spoil* or other matter as hereinbefore stated. This waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the grantor and on his. . . heirs, successors and assigns.

(Emphasis added). The government claims that the release bars the present suit. The district court ruled that the release only applied to the easement, not to the retained land of the grantor and his successors which was unencumbered by the easement.

In *Hilton v. Duke Power Co.*, 254 F.2d 118 (4th Cir. 1958), the court interpreted a release signed by the grantors of an easement. The court said:

> It is a general rule, well established, that "the construction of the release as to the actual intent of the parties presents a question of fact to be determined from the surrounding conditions and circumstances, construed with reference to the amount of consideration paid and the language of the release itself." 45 Am.Jur., "Release," Sec. 28, p. 692.

Id. at 124. The district court found that at the time the easement was granted it was reasonable to assume that the waterway probably would not extend over the entire 320 feet granted in the easement. Thus, the parties only intended that the release apply to suits arising from activities on the easement itself.

Since the intent of the parties is a question of fact and the record contains evidence supportive of the conclusion reached, the district court's finding is not clearly erroneous. Furthermore, a simple reading of the language of the release strongly suggests that the waiver of claims for construction and maintenance damages does

not here apply. Erosion through wave wash is neither construction nor maintenance. Rather, it is destructive and creates a need for maintenance.

III.

Were, as is the case with other sections of the AIWW, the Horry County portion here involved a natural body of water,[3] it would clearly be a navigable body of water[4] subject to the dominant navigational servitude of the United States.[5] In that case, the erosion here complained of would not be compensable by the United States. *See Pitman v. United States*, 457 F.2d 975 (Ct. Cl. 1972).

The United States' plenary admiralty jurisdiction does extend to man-made bodies of water which are navigable. *Ex parte Boyer*, 109 U.S. 629 (1884). However, the fact that a man-made stream is "navigable" does not, in and of itself, mean that the United States'

[3]/Parts of the AIWW, including portions in existence when the grant by Ballam's predecessor dated September 10, 1931 was made, traverse natural bodies of water. However, the portion of the AIWW which touches upon the plaintiff's land is wholly man-made. Prior to construction of the AIWW, the plaintiff's land was wholly land-locked, part of a plain, generally 25 to 50 feet above sea level. *See* H.R. Doc. No. 41, 71st Cong., 1st Sess. 11 (1929).

[4]/At common law, "navigable waters" were defined as those waters subject to the ebb and flow of the tide. The Supreme Court abandoned the common law rule in 1871 and substituted a navigable-in-fact test for determining if waters are "navigable." *See The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). The AIWW is both subject to the ebb and flow of the tide and navigable-in-fact.

[5]/The navigational servitude describes the power whereby the United States need not compensate private owners for damage to their property caused by improvements to navigable streams, which aid navigation and do not raise the level of the stream. *See United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U.S. 592, 596-99 (1941); *see also* Fitts and Marquis, *Liability of the Federal Government and Its Agents for Injuries to Real Property Resulting from River Improvements*, 16 Tenn. L. Rev. 801 (1941).

navigational servitude attaches to it. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court held that, although a privately owned pond which was connected to a navigable bay by a private, manmade improvement was "navigable water," the government's attempt to create a public right of access to the pond was a taking requiring compensation. Similarly, in *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979), the Court held that the public had no right of use of private canals connected to navigable waterways.

Nevertheless, in the present case, public right of access and use were fully contemplated and altogether evident from the very outset, prior to the acquisition of easements, in particular prior to the conveyance of September 10, 1931 by Ballam's predecessor. He knew, when he executed and delivered the deed, that public access to the AIWW extension to be constructed in Horry County was part and parcel of the contemplated project. The waterway extension was unmistakably to be built by the United States with public funds. Ballam's predecessor either was compensated for his giving an easement to build a waterway to be generally available for use by the boating public, or he determined that the benefit to his remaining land merited the conveyance for the nominal sum of $1.00. Ballam's predecessor acknowledged in his grant that the waterway would be part of "the navigable waters of the United States."

Ballam's predecessor and others similarly situated thus appreciated the intent to create on the properties for which easements were granted exactly the same situation or condition as already existed in extant situations of properties adjoining naturally created segments of the AIWW. As a matter of intent, derived from the four corners of the instrument, the parties to the easement grant and to the transfer thereof contemplated that the situation would be the same after the AIWW had been extended as though it had always existed as a product of natural forces. Upon these facts we hold that the AIWW, even as constructed in Horry County, had from the outset of its existence the attributes of a natural, publicly navigable waterway subject to the dominant navigational servitude of the United States.

The Fifth Amendment to the Constitution requires that the United States compensate persons when it takes their property. The government, nevertheless, need not pay compensation for damage to land that would have occured in the absence of government improvement of a waterway. In *Sanguinetti v. United States,* 264 U.S. 146 (1924), the Court held that the government was not liable for flooding caused by a canal because the land would have flooded in its natural state. In *Loesch v. United States,* 645 F.2d 905 (Ct. Cl. 1981), *cert. denied,* 454 U.S. 1099 (1981), it was held that the government was not liable for erosion caused by flooding of the Ohio River because the government's dams did not increase the natural frequency, duration or peaks of floods.

The waterway in the present case was wholly constructed by the United States. However, the grant of Ballam's predecessor estops Ballam from claiming the waterway is artificial so long as the government has done nothing to alter the waterway in a fashion not contemplated at the time the plaintiff's predecessor granted the easement. The waterway has never been expanded by the government beyond the scope originally contemplated by the report referred to in the deed from Ballam's predecessor. The purpose was to create a navigable waterway indistinguishable from one which came about through application of the forces of nature. Thus, we treat the waterway in Horry County as if it were a natural river.

There can be no liability on the part of the United States for erosion damage unless there is a showing that the United States directly and proximately caused the damage. *See Loesch v. United States,* 645 F.2d 905 (Ct. Cl. 1981), *cert. denied,* 454 U.S. 1099 (1981). The erosion damage in the present case was caused by wave wash from passing ships, not the actions of the United States.[6] Thus, the district

[6]/Indeed, apart from other applicable provisions of the grant from Ballam's predecessor, on the basis of the dominant navigational servitude alone, any other damage that may have been caused by direct, government action to the AIWW to aid navigation but did not increase the level of the stream (*e.g.,* dredging) is also noncompensable. *See Pitman v. United States,* 457 F.2d 975 (Ct. Cl. 1972).

court should have entered judgment in favor of the United States.

REVERSED AND REMANDED FOR ENTRY OF JUDGEMENT IN FAVOR OF THE UNITED STATES OF AMERICA.

ERVIN, Circuit Judge, dissenting:

The majority's conclusion hinges on the assumption that the grant of the original easement created "exactly the same situation or condition" that would have existed if the waterway in Horry County had been natural and not man-made. If one accepts this premise, then it is clear that the section of the waterway that crossed Mrs. Ballam's land was subject to the dominant navigational servitude of the United States and any erosion that occured beyond the boundaries of the easement was noncompensable.

I remain unconvinced that this premise is valid. The deed expressly limited the easement in the initial grant to a strip of land 320 feet wide and 1700 feet long. Within these precise boundaries, Mrs. Ballam's predecessor authorized the United States, through the State of South Carolina, to construct a canal linking two stretches of natural waterway. The easement granted no more and no less than the exact piece of land described in the deed. The document states only that the grantor

> does grant, bargain, sell and release unto the said State of South Carolina, its successors and assigns, the perpetual right and easement to enter upon, excavate, cut away, and remove any and all of the hereinbefore described tract numbered 37-A as may be required at any time for construction and maintenance of the said inland waterway, or any enlargement thereof, and to maintain the portion so excavated and the channel thereby created as a part of the navigable waters of the United States; and the further perpetual right and easement to enter upon, occupy and use any portion of said tract numbered 37 not so cut away and converted into public navigable water as

> aforesaid, for the deposit of dredged material and for such other purposes as may be needful in the construction, maintenance, and improvement of the said inland waterway; reserving, however, to the grantor, his, her, its heirs, successors and assigns, all such rights and privileges in said tract of land as may be used and enjoyed without interfering with or abridging the rights and easements hereby conveyed.

J.A. at 14. Had Mrs. Ballam's predecessor wished to grant the government land for the waterway *and* such additional land as would be needed or consumed during construction and use of the canal, that understanding could easily have been included in the deed.

In my view the majority has read far more into the words "created as a part of the navigable waters of the United States" than is warranted by a careful reading of the grant limited to the four corners of the document. The grant makes clear that the government will not only construct but maintain the waterway: "the said grantor does grant [the stated tract] as may be required for *construction* and *maintenance* of the said inland waterway." J.A. at 14 (emphasis added). It is unclear to me why a servitude protecting the government from liability for its failure to maintain the sides of the canal and protect against erosion should now be read into the deed.

A taking by the government is permissible provided there is reasonable compensation to the owner. *See United States v. Causby,* 328 U.S. 256 (1946); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). An initial lawful taking, however, cannot be expanded without additional compensation. *See United States v. Virginia Electric & Power Co.,* 365 U.S. 624 (1961). Were the Atlantic Intercoastal Waterway a highway, the use of which had caused the destruction of adjoining land, there is no question that the government would be required to compensate for the adjoining land as well as the land on which the highway sat. The same principles apply here. I see no just reason why Mrs. Ballam should suffer potentially the loss of her entire property without compensation simply because the government failed to construct a waterway in a man-

ner that ensured the terms of the easement grant would not be violated.

The majority, of course, goes on to argue that "wave wash," and not the government, was responsible for the erosion. Thus, even if a navigational servitude did not exist, in their view there was insufficient causation to establish a compensable taking under the fifth amendment. The problem with this argument, however, is that it ignores the obvious; but for the government the waterway would not have crossed Mrs. Ballam's land. I am hardpressed to determine who or what, other than the government, is responsible for the damage. To draw a distinction between "wave wash" and the government amounts to a distinction without real meaning.

Because the initial easement makes no provisions for the use of land beyond the specific boundaries set out in the deed, and because the government's actions resulted in the taking of fast[1] land beyond those boundaries, I would affirm the decision of the district court.

[1]Fast land is defined as: Mainland; esp: land that is high and dry near water: upland. *Webster's Third New International Dictionary* 827 (1976). There was no inland waterway across Mrs. Ballam's land prior to the execution of the easement and the construction carried out by the government. The majority proceeds on the assumption that the execution of an easement and the subsequent building of a portion of the inland waterway across fast land where there was no natural waterway originally vests in the United States a right of dominant navigational servitude identical to that existing where there was a natural navigable waterway in the beginning. I do not believe that either the law or the easement in question produces such a result nor did the signature parties to the easement so intend.

Disposition of Petitioner's Petition for Rehearing and Suggestion for Rehearing in Banc in the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1120

Loy Ree B. Marlowe Ballam,

Appellee,

versus

United States of America,

Appellant,

and

State of South Carolina,

Defendant.

Appeal from the United States District Court for the District of South Carolina, at Florence. Adrian S. Spears, District Judge.

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Phillips. Judge Ervin dissents.

For the Court,

John M. Greacen

Clerk

Order of the United States Supreme Court

Loy Ree B. Marlowe BALLAM v.
UNITED STATES, No. 84-1750.

On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Jan. 21, 1986. Certiorari is granted. The judgment is vacated and the case is remanded for the Court of Appeals to transfer the case pursuant to 28 U.S.C. § 1631 to the Court of Appeals for the Federal Circuit. See 28 U.S.C. § 1295(a)(2).

It is so ordered.

Opinion of the Court of Appeals for the Federal Circuit

LOY REE B. MARLOWE BALLAM,
Appellee,

v. Appeal No. 86-1058

THE UNITED STATES,
Appellant.

DECIDED: November 28, 1986

Before MARKEY, *Chief Judge*, NICHOLS, *Senior Circuit Judge*, and BISSELL, *Circuit Judge*.

NICHOLS, *Senior Circuit Judge*.

Appellee Ballam brought this suit in the United States District Court for the District of South Carolina under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2), claiming "just compensation," not over $10,000, for erosion of her upland, called by her a "taking" of it, resulting from waves on a portion of the inland waterway (Atlantic Intracoastal Waterway), running across it. This portion, unlike most of the waterway, is artificial, cut by the United States through her land pursuant to an easement so authorizing, granted by her predecessor-in-title in 1931 to South Carolina, and by it retransferred to the United States. The district court [Spears, *J*], after trial, made findings and conclusions of law, upholding appellee's claim and awarding $8,804, of which $664 was for land already lost to erosion and the remainder for the anticipated cost of protecting the remainder by sloping and revetment. 552 F. Supp. 390 (1982). The United States appealed and we reverse. We hold no taking was shown and therefore no just compensation is due.

Opinion of the Court of Appeals for the Federal Circuit

I

The waterway is an ambitious undertaking to create a safe sheltered passage along the coast for the smaller natures of vessels. It makes use mostly of natural waters inside the barrier islands, already there if needing dredging and buoys, but includes some artificial cuts such as that here involved. It does not involve use of any dams to raise the natural water level, which remains at or near that of the adjacent ocean, and thus the case does not present the "flowage easement" problem such as the Army Engineers often present to the courts in connection with their river improvements. Numerous "flowage easement" cases are strained and distorted by the parties herein to make them fit the instant issues.

The original grant of the easement to South Carolina by O.J. Bell, dated October 15, 1931, recites his awareness that by the Rivers and Harbors Act of 1930, Congress provided for a section of the waterway, from Cape Fear River, North Carolina, to St. Johns River, Florida, local interests to provide free of cost rights-of-way sufficient for the canal prism and the disposal of spoil therefrom. The easement as he granted it was 1,700 feet in length and 320 feet wide. As enlarged in 1941, the canal was about 235 feet wide at the "top" of the waterway. Ballam, who now owns but a part of Bell's original tract on the north side of the cut, has within it 58 feet of the unused portion of the right-of-way. Bell received $1 in consideration from the state which, in turn, granted the easement to the United States as all parties intended. The easement is —

> [T]o enter upon, excavate, cut away, and remove any and all of [two tracts as specified by metes and bounds] as may be required at any time for construction and maintenance of the said inland waterway, or any enlargement thereof, and to maintain the portion so excavated and the channel thereby created as a part of the navigable waters of the United States; and the further perpetual right and easement to enter upon,

> occupy and use any portion of said [tracts, as above stated] not so cut away and converted into public navigable water as aforesaid, for the deposit of dredged material, and for such other purposes as may be needful in the construction, maintenance, and improvement of the said inland waterway;***

There was also a waiver of damages as follows:

> The grantor does hereby waive and release the grantee, its successors and assigns and its or their officers, agents, servants, and contractors from any and all claims for damages which may result from the construction and maintenance of the waterway and the deposit of spoil or other matter as hereinbefore stated; this waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the grantor and on his, her, its heirs, successors and assigns.

There is nothing express in this grant as to how erosion by wave action was to be dealt with; what is implied we consider later. There is no evidence the parties anticipated the problem. Erosion commenced, however, and is found to have been caused principally by the wash from vessels using the waterway. Another Mr. Bell commenced complaining on behalf of his family to the Army Engineers who had built the waterway and were operating it. A letter by the district engineer, February 5, 1976, to Mr. Bell, acknowledges that "erosion is a problem all along this portion of the waterway." He states, however:

> A review of Federal responsibilities concerning bank erosion reveals that the Corps of Engineers is without authority to undertake works to control bank erosion on private lands bordering the Waterway.

He suggests they consult the South Carolina State Development Board —

> [W]hich is the sponsor for the Waterway project and the agency designated to provide the items of local cooperation necessary for Federal participation in the project construction and maintenance.

Apparently the idea here is that having undertaken to provide necessary rights to the Federal Government without cost, South Carolina ought to bear this unforeseen cost. He ends, however, he will be pleased to advise Mr. Bell regarding what type of structure might be required to "combat your particular erosion problem." Translated from Bureaucratese, this appears to mean that Mr. Bell and those he represents must bear the revetment or like expenses that are needed themselves, or get them from South Carolina.

Mr. Bell filed this action in 1982, seeking damages not over $10.000 and injunctive relief. South Carolina was joined but dismissed on the ground it was not the party damaging the Ballam property, a determination not challenged in this appeal. The decision appealed from, after a trail before Judge Spears without a jury, holds that the United States cannot invoke a navigation servitude because its rights are derived from the easements granted and not from its sovereign rights to aid navigation. Even if they were, however, they would not include the right to erode "fast lands," which are well above high tide. He refused grant of an injunction, because the "Little Tucker Act" does not so provide.

The case then took an unfortunate turn. The government appealed to the Fourth Circuit although the Federal Courts Improvement Act, Pub. L. No. 97-164, was then in effect, and provided that jurisdiction of "Little Tucker Act" appeals resided here. 28 U.S.C. § 1295(a)(2). The Fourth Circuit proceeded in all good faith to decide the case on the merits. 747 F.2d 915 (1984). It held for reversal by a divided panel. Ballam petitioned for certiorari and the Supreme Court vacated the judgment and remanded with directions to transfer to this court. 106 S.Ct. 844 (1986). This has been done and so the case is here, all this time and litigation cost for $8,804. It is suggested, "to save judicial resources," we should adopt the vacated decision as our own which possibly we could do by taking its words as ours, though we could not revive the jurisdiction of the Fourth Circuit. We agree generally with what it says, and are greatly aided by its analysis. However, we

prefer to state our legal conclusion in our own words in view of our position as the sole appellate court to decide, under the Supreme Court, the meaning of the Tucker Act with respect to claims under the Constitution.

II

The district court and the Fourth Circuit both take up first the government's reliance on the clause waiving future claims for damages, according to them a threshold defense. Both say it is unavailable for that purpose. We agree on the simple ground that it does not clearly and unambiguously waive any claim except a claim against the government for doing what it is elsewhere given the right to do, *i.e.,* to dig and maintain a canal and deposit spoil on the portion of the banks within the easement boundaries. We must construe the 1931 grant as a whole and not decide the case on this portion of it extracted from its context.

The government also relies on a defense under the statute of limitations. 28 U.S.C. § 2401(a). When the right of action first accrued may turn, however, on what property right the government is supposed to have taken and by what act the government took it. We will, therefore, return to the statute of limitations issue after we have answered these basic questions.

III

Turning now to the merits, the question is often rhetorically stated to be whether the government may take, without compensation, all of Mrs. Ballam's upland beyond the easement line (appellee's brief at 30), or that she faces, if the government prevails, "potentially the loss of her entire property without compensation" (dissent of Judge Ervin, 747 F.2d at 920). The real issue, however, is much narrower. It is who, Mrs. Ballam or the government, must defray the cost, found to be $8,160, to provide a revetment stopping the erosion. This would protect a property found to be worth $65,000, and the government, having no wish

to erode further, offered to assist her by advice if she elected to do it. It is only whether that cost should be shifted to the government that is at issue here.

It should go without saying that not every economic injury is a taking. As Justice Jackson wrote in *United States* v. *Willow River Power Co.*, 324 U.S. 499, 502-03 (1945), a Tucker Act case:

> The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only which result from a taking of property***. But not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.*** We cannot start the process of decision by calling such a claim as we have here a "property right"; whether it is a property right is really the question to be answered.

In accordance with that analysis, the first issue to be decided here is whether Mrs. Ballam's claim to be compensated for the cost of a revetment, as calculated and awarded by the district court, is a property right. That is the only real issue. The government does not claim a right to erode Mrs. Ballam's land. It is, and always was, perfectly willing for her to erect safeguards to avert that possibility. The issue is whether she has a property right to shift the cost of those safeguards. The government denies she has any such right. It denies liability for any erosion that results from her failure to erect safeguards at her own expense.

If Mrs. Ballam has a property right to shift such costs, it must result from the language of Mr. O.J. Bell's grant of October 15, 1931, quoted above. The grant, however, says nothing expressly to guide us here. The Fourth Circuit majority found a strong impli-

cation that the rights and duties between the government and adjacent landowners who granted easements for artificial parts of the waterway, should be the same as those that existed along natural parts of the waterway. This interpretation resides particularly in the words —

> [A]nd to maintain the [said waterway or any enlargement thereof, and to maintain the] portion so excavated and the channel thereby created as part of the navigable waters of the United States;***

The grant further refers to the cut as "public navigable waters." The fact the cut will be part of the segment of the inland waterway as enlarged under the 1930 Rivers and Harbors Act, is also mentioned. The grantor such as O.J. Bell, who retained land outside the easement, would look to the situation respecting the natural portions of the waterway to see what his rights were *vis a vis* the Army Engineers. So far as he was concerned, the cuts were to become navigable waters as soon as dug and opened for shipping to use. It is therefore natural, and an implied term of the grant, that the grantor should look for guidance as to his property rights, to those of upland owners adjacent to natural waterways which have been developed for navigation by the Army Engineers without making new cuts through the land. Erosion is not, of course, confined to artificial cuts, but is common in all coastal waters. It may result from natural waves, from artificial waves caused by vessels, or from currents, and may be caused for the first time, or greatly increased, by dredging, jettying, etc., done by the Army Engineers, which does not impinge directly on the eroded land at all. The Fourth Circuit rightly says, 747 F.2d at 919:

> As a matter of intent, derived from the four corners of the instrument, the parties to the easement grant and to the transfer thereof [by South Carolina to the United States] contemplated that the situation would be the same after the AIWW [Atlantic Intracoastal Waterway] had been extended as though it had always existed as a product of natural forces.

It hardly is pretended that the government would be responsible to landowners on natural navigable water for erosion caused by public works which do not themselves impinge on such upland but only cause water to do so by waves or currents causing erosion. The appellee, and the court below, cite no such cases. There is one the other way, a binding precedent in this court, by one of our predecessors, *Pitman* v. *United States,* 457 F.2d 975 (Ct.Cl. 1972). It involved a tract of Florida ocean beach rapidly and continuously eroding following the Army Engineers' construction of jetties for a new harbor entrance, in no part on plaintiff's land, but causing the erosion by diverting to a new and destructive direction ocean currents that previously had been harmless:

> Thus, while a riparian owner has a right to have navigable waters come to him unchanged in their natural condition as against other riparian owners, he has no such right against the paramount power of the United States to improve navigation. [Citing cases.]

Id. at 977.

That precedent makes this case a fortiori in one respect. There, no human actions did anything to bring about the result after the Army Engineers built the jetty, but here, of course, the harm resulted directly and proximately from the acts of persons navigating vessels up and down the waterway, and generating waves therein. We are not, however, inclined to give this fact as much significance as the Fourth Circuit did and as the United States does in its brief. It is a consideration more appropriate to tort law. The decisive point is that Pitman had no property right to be safeguarded by the Army Engineers against collateral consequences of navigation improvements. Had Pitman's erosion resulted from the wash of vessels using the new harbor entrance, the law would have been the same.

Neither the trial court, nor Judge Ervin in his dissent, contended that the *Pitman* case would not be good law if this part of the waterway were natural, not an artificial cut. Their position

rather is, as we read it, that the easement grant defines the area the government has a right to impair in any manner, and thus the mutual rights and duties are unlike those that would obtain with a natural waterway. If, however, one realizes that we are not concerned with a claim by the government that is has a right to erode by wave wash Mrs. Ballam's land outside the easement area, the case does not look the same. It offered to assist her (by advice) in selecting means to prevent such erosion. The issue is the government's contention it has a right to open the channel to navigation without incurring any liability for measures thereby made necessary to prevent erosion. Mrs. Ballam says it does incur such liability. The award is almost wholly the cost of such measures. The geographical scope of the easement is irrelevant to this. If Mrs. Ballam has the property right she claims at all, it would seem it would be equally valid for land within the easement area, but not yet used for canal enlargement or spoil; she could have that covered by revetment at government expense also. We believe the statements referred to, favoring her claim, really reflect acceptance of the rhetoric that the government claims a right to erode all her land.

IV

Our consideration of the government's statute of limitations defense, 28 U.S.C. § 2401, has been deferred because we could not determine the date of accrual of the claim until we determined what is claimed. Now we know appellee asserts a property right to have suitable revetments constructed at public expense to protect her land against erosion by waves made by vessels passing along the waterway. What we decide about jurisdiction will not affect the result, but could affect the *res judicata* and collateral estoppel consequences of what we say and hold. Statutes fixing limitations on suits for money damages against the United States are jurisdictional because they are preconditions on the consent of the United States to be sued, which must be strictly construed. *Soriano* v. *United States,* 352 U.S. 270 (1957); *Kabua* v. *United States,* 546

F.2d 381 (Ct. Cl. 1976), *cert. denied,* 434 U.S. 821 (1977).

Mr. H.F. Bell, on behalf on this appellee and others, notified the Army Engineers December 8, 1975, that erosion causing property loss was occurring. He claimed a right to have action taken to prevent future erosion, and damages for what had occurred already. The Army Engineers conducted a field reconnaissance from which they learned "that erosion is a problem all along this portion of the Waterway." On February 5, 1976, the district engineer advised Mr. Bell of this, but declined "to undertake works to control said erosion on private lands bordering the Waterway." He referred Mr. Bell to the South Carolina State Development Board. He "would be pleased to advise you regarding the general type of structure required to combat your particular erosion problem."

Considering the peculiar type of property right asserted in this action, and the main basis of the award, a right to have the Army Engineers construct or finance revetments or other structures to inhibit erosion, we do not think a cause of action could have accrued before the Army Engineers had been informed of the claim and had ruled upon it. The ordinary claim case as *Soriano, supra,* is inapposite. A suit would have been premature before demand and refusal. It was up to them to decide how they would respond if they thought the claim valid: by new public works or by money. *Friedman* v. *United States,* 159 Ct.Cl. 1 (1962), *cert. denied,* 373 U.S. 932 (1963). Therefore, the cause of action, if any, accrued February 5, 1976, and as the complaint was filed in the district court January 25, 1982, it was within six years and timely. The district court therefore had jurisdiction, as do we, to consider in our case more than whether we have jurisdiction.

To the small extent, $644, the award was for land actually washed away before the date of judgment, this occurred also within six years before action filed, as we read the findings. The judge finds seven, but this apparently is to the date of his order.

The government's statute of limitations' argument seems to assert the cause of action accrued whenever Mrs. Ballam had reason to know that erosion on the waterway was going to be a problem. This hardly requires to be refuted: anticipation that land in future will wash away if nothing is done is not accrual.

Conclusion

Accordingly, the judgment below is reversed with directions to dismiss the complaint.

Reversed

Opinion of the Court of Appeals for the Federal Circuit

LOY REE B. MARLOWE BALLAM,
Appellee,

v. Appeal No. 86-1058

THE UNITED STATES,
Appellant.

BISSELL, *Circuit Judge,* dissenting-in-part.

I respectfully dissent to part III of the majority opinion. The majority analyzes the taking issue by looking first at what property right Ballam alleges was taken by the government. The majority says the right asserted is the right to be compensated for the cost of a revetment, which both parties concede is necessary to stop the erosion of Ballam's land. The majority concludes that the taking issue resolves itself when one realizes that the government does not claim the right to erode Ballam's land.

I do not think the majority correctly answers the question it says is the key to the case: What property right does Ballam assert was taken by the government? The right asserted is not the right to be compensated for a revetment, rather it is the right to exclusive use of her property. It is true, that the government does not claim the right to erode Ballam's property, but the wave action in the waterway dug by the government is daily taking a portion of Ballam's property and denying her the exclusive use of it. The government does not claim the right to take more, but the wave action will continue to do so until a revetment is built.

A homey analogy illustrates the problem. If my neighbor and I own adjoining lots, to which each has exclusive use, and my neighbor's dog comes upon my lot and digs up my flower bed, under the majority's analysis I must forego all damages as it is I who must bear the cost of erecting a fence to stop the "taking" of

my flowers, because my neighbor does not claim a right to have his dog come upon my property and disturb my flower bed.

The district court found that Ballam was entitled to damages in the amount of $644 for property lost through erosion, and $8,160 to protect the land from future erosion for a total damage award of $8,804. In my example, applying the district court's damage analysis, I would be entitled to damages of X amount of dollars for my flowers plus X amount to build a fence to keep an uncontrollable and continuing trespasser off my property. Under the majority's analysis, I would be entitled to no damage award as it is my responsibility to keep the trespasser off my land while my neighbor bears no responsibility for my lost flowers or for the prevention of any recurrence.

In this case, if the easement granted by Ballam's predecessor in title and assigned to the government means anything, it means that Ballam has given up the right to exclusive use of that portion of her land described in the easement, but not the rest of her land. In my view, Ballam has a right to the exclusive use of her property outside the easement. The government should not be allowed to take that property right without just compensation.

The remedy in this situation is, however, different than in most taking cases because the taking is continuous. Our courts cannot enjoin the waves or my neighbor's dog; they can, however, require the responsible party, in this case the government, to bear the cost of erecting a barrier that will prevent the taking from continuing. Furthermore, contrary to the majority's analysis, the government should be required to compensate Ballam for her eroded land outside the easement.

I agree with the position of the trial court and Judge Ervin as posited by the majority: "[T]he easement grant defines the area

the government has a right to impair in any manner, and thus the mutual rights and duties are unlike those that would obtain with a natural waterway." Majority slip op. at 12.

The government argues that even if a navigational servitude did not exist, there is insufficient causation to establish a compensable taking under the fifth amendment. I agree with Judge Ervin's rebuttal to this "wave wash argument":

> The problem with this argument, however, is that it ignores the obvious; but for the government the waterway would not have crossed Mrs. Ballam's land. I am hard-pressed to determine who or what, other than the government, is responsible for the damage. To draw a distinction between "wave wash" and the government amounts to a distinction without real meaning.

Ballam v. United States, 747 F.2d 915, 920-21 (4th Cir. 1984) (Ervin, J., dissenting).

I would affirm the decision of the trial court.